Supreme Court, U.S.
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NO. _____

In The
Supreme Court of The United States
November Term 1994

NICK BERLEY WAYCASTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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70 pp

QUESTIONS PRESENTED

I. Did the Court of Appeals commit err, ignore, or misapply the standards of United States v. King, 879 F2d 137 (Fourth Cir.), Cert. denied, 493 U.S. 900, 110 S Ct 257, 107 L Ed 2d 206 1989, in finding that the Trial Court did not err in allowing the government to introduce, over the objection of the Petitioner, Government's Exhibit Seventeen (17)?

II. Did the Court of Appeals fail to properly apply the standards of 18 U.S.C 3501 regarding admission of confessions in finding that the trial did not err in allowing into evidence, over the objection of the Petitioner, several purported statement of the Petitioner?

III. Did the Court of Appeals err in failing to grant the Petitioner's Rule

29 Motion for judgement of acquittal due to the insufficiency of the evidence at the close of the government's case and at the close of all the evidence?

PARTIES

The party to this proceeding is the Petitioner (defendant below), Nick Berley Waycaster, and Respondent (plaintiff below) United States of America.

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No.

UNITED STATES SUPREME COURT

November Term, 1994

UNITED STATES OF AMERICA, Plaintiff/Respondent,	)
v.	)
NICK BERLEY WAYCASTER, Defendant/Petitioner.	)

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATE COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner, Nick Berley Waycaster, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Fourth Circuit entered in the proceeding on September 6, 1994.

OPINION BELOW

Opinion of the United States Court of Appeals for the Fourth Circuit (No. 93-5891) (September 6, 1994) (unpublished) (App. A1-A19).

JURISDICTION

The judgment of the Court of appeals was entered on September 6, 1994. This petition is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

On September 6, 1994, the United States Court of Appeals for the Fourth Circuit entered a published opinion as shown in separate appendix pp. A1-A19 affirming the District Court judgment entered on October 28, 1993, and filed in written form on December 22, 1993.

The appellant was charged in an eight (8) count superseding Bill of Indictment, filed September 1992, with Conspiracy To Manufacture Amphetamines (21 U.S.C. § 846 and 841(a)(1)), Conspiracy to Distribute Amphetamines (21

U.S.C. § 846 and 841(a)(1)), Possession of Phenyl-2-Propanone (21 U.S.C. § 844), and five (5) counts involving Money Laundering (18 U.S.C. § 1956(a)(1)(b)(ii), 1957, 21 U.S.C. § 841 (a)(1), and 26 U.S.C. § 6050 I(f)(1)(c)). At trial the Government moved to dismiss counts' four through eight of the superseding Bill of Indictment which motion was granted. Appellant proceed to trial on the first three counts of the indictments charging Conspiracy to Manufacture and Distribute Amphetamines and Simple Possession. After the selection of the jury and prior to the beginning of the Governments case the Petitioner through counsel objected to the introduction of certain Rule 404(b) evidence whereupon the court conducted a

hearing and over ruled the Petitioners objections.

The Government through its witness, Special Agent David Barnes, of the State Bureau of Investigation presented evidence concerning certain statements alleged made by the Petitioner during the course of a search of the Petitioners residence, to which the Petitioner objected, and thereafter, the court conducted a hearing to determine whether or not the statement met the criteria of 18 U.S.C. § 3501, and after said hearing determined that the evidence would be admitted over the objection of Petitioners counsel. The Petitioner also objected to various other purported statements of the Petitioner offered by the Government. The Court conducted a Rule 3501 hearing and concluded that the

statements were admissible over the objection of the Petitioners counsel.

At the close of the Governments case the Petitioner, through counsel, moved for a Judgment Of Acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure which was denied. The Petitioner thereafter presented evidence and at the close of all the evidence renewed the Rule 29 motion for Judgment Of Acquittal. The court denied the motion and submitted the case to the jury.

The jury returned verdicts of guilty on all three counts on November 5, 1992.

After the entry of the jury verdict, the court took the Petitioners Motion For a Judgment of acquittal pursuant to Rule 29 as to count three under advisement, and thereafter, entered an order denying

said motion on the 18th day of March, 1993.

This matter was brought on for sentencing on October 28, 1993, and the Petitioner was sentenced to a term of imprisonment of one-hundred eighty-eight months (188) on counts 1 and 2, and twelve (12) months on Count three all to be served concurrently.

The Petitioner gave written Notice Of Appeal which was filed with the Office of the Clerk of the United States District Court for the Western District Of North Carolina on November 8, 1993. The United States Court of Appeals for the Fourth Circuit heard oral arguments on this matter on July 20, 1994, and, thereafter, entered an unpublished opinion on September 6, 1994. (App. A1-A19).

The Petitioner has in amp time filed with this honorable court Petition for Writ of Certiorari asking this Court to hear these matter pursuant to 28 U.S.C. § 1254(1).

The Petitioner contends that the Trial Court erred in allowing the Government to introduce into evidence Government's Exhibit Seventeen over the objection of the Petitioner, which was a picture of the Petitioner, Vaughn, and others sitting or standing at a table on which was located a substance which the Government conceded in its argument to the Court was not a controlled substance and was not illegal in violation of Rule 404(b) and Rule 403 and the cases pertaining thereto.

The Petitioner also contends that the Trial Court erred in allowing into

evidence over the objection of the Petitioner several purported statements made by the Petitioner to various agents in violation of 18 U.S.C. § 3501(b).

The Petitioner further contends that the Court erred in failing to grant Petitioner's Rule 29 Motion for Judgement of Acquittal both at the close of the Government's case and at the close of the entire case particularly as to Court 3 of the Indictment in which the Petitioner was charged "knowingly and intentionally" possessing Phenyl-2-Propanone on April 24, 1990, in violation of 21 U.S.C. § 844. The Petitioner has contended that only a trace amount of a controlled substance existed which was unknown to the Petitioner; and therefore, the Petitioner did not "knowingly and intentionally" possess the controlled

substance as required by the Statute. The evidence further established that the trace amount of P-2-P would amount to less than one percent (1%) of the total; and from the testimony of the Agent Allcox, a North Carolina State Bureau of Investigation Chemist, that unless you were a chemist, performed that tests that he performed, and/or smelled the characteristic odor of P-2-P in the substance, one would not be aware that P-2-P was present.

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW ERRED, IGNORED, OR MISAPPLIED THE STANDARDS OF UNITED STATES V. KING, 879 F2D 137 (FOURTH CIR.), CERT. DENIED, 493 U.S. 900, 110 S CT 257, 107 L ED 2D 206 1989, IN FINDING THAT THE TRIAL COURT DID NOT ERR IN ALLOWING THE GOVERNMENT TO INTRODUCE, OVER THE

OBJECTION OF THE PETITIONER, GOVERNMENT'S EXHIBIT SEVENTEEN (17).

The Government sought to introduce into evidence Government Exhibit Seventeen (17), which is a picture of the Petitioner, Vaughn and others standing or sitting at a table on which is located a batch of substance referred to by the Government as "poor man's speed" or L-ephedrine hydrochloride.

The Petitioner through Counsel objected to the introduction of Exhibit Seventeen (17) and the Court thereafter conducted a hearing out of the presence of the Jury to determine if the exhibit met the requirements for admission into evidence under Rule 404(b) of the Federal Rules of evidence.

The Government conceded in its argument to the Court that the substance

pictured in Government Exhibit Seventeen (17) was not a controlled substance and was not illegal. However, despite the knowledge by the Government and as testified to by Vaughn, the Government sought to introduce the picture and was allowed to do so over the objection of the Petitioner.

According to Vaughn the picture was taken in November of 1988 and showed the Petitioner, Nick Waycaster, Sr., Nick Waycaster, Jr., Ronnie Alcor and Vaughn in the dining room of Vaughn's house. The substance depicted was a stimulant of which were legal substances cooked by Vaughn on the stove in his kitchen.

Clearly, the picture was very prejudicial to the Petitioner even though he was charged with no crime involving

the substance shown in the picture or any activity involving said substance.

Rule 404(b) clearly establishes that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, planned, knowledge, identity, or as a mistake or accident.

It is central to our system of Criminal Justice that the accused be protected against forcible inculcation either through words or proof of past misdeeds. The Exclusionary Rule embodied in Rule 404 renders inadmissible, as part of the prosecutions evidence in chief, character evidence offered solely to show

the accused's propensity to commit the crime with which he is charged. United States v. King, 879 F2d 137 (Fourth Cir.), Cert. denied, 493 U.S. 900, 110 S. Ct 257, 107 L Ed 2d 206 1989; United States v. Zelinka, 862 F2d 92 (Sixth Cir. 1988); United States v. Wright, 901 F2d 68 (Seventh Cir. 1990).

The rational underlying the Exclusionary Rule of 404, sometimes referred to as "Propensity Rule," is that the prejudicial effect of such evidence out weighs any preoperative value. United States v. Moccia, 681 F2d 61, 63 (First Cir. 1982), (Rule is based on theory that prejudicial effect from risk that Jury will convict for crimes other than those charged, or because Petitioner is a bad person who deserves punishment

out weighs probative value of evidence, citing treatise).

Rule 404(b) provides that character evidence is admissible if it is relevant to prove something other than that the accused in conformity with his character.

It is respectfully argued that Rule 404(b) is a specialized Rule of relevancy and accordingly the Government prior to introducing such evidence should be required to:

1. Identify the consequential fact to which the proffered evidence of other crimes, wrongs, or acts as directed;

2. Prove the other crimes, wrongs, or acts, and;

3. Articulate precisely the evidential hypostasis by which a consequential fact may be inferred from the preferred evidence. United States v.

Rivera, 837 F2d 906 (10th Cir. 1988); United States v. Mehremanesh, 689 F2d 822 (9th Cir. 1982). In United States v. Shackleford 738 F2d 776 (7th Cir. 1994). The Seventh Cir. established a four part test under Rules 404 to determine admissibility: "Our decisions indicate that, under the dictates of Rule 404(b) and Rule 403, admission of evidence of prior or subsequent acts will be approved if (1) The evidence directed toward establishing a matter and issue other than the Petitioner's propensity to commit the crime charged, (2) The evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue, ie, such that "the consequential fact may be inferred from the proffered evidence," (3) The evidence is clear and convincing

and (4) The probative value of the evidence is not substantially out weighed by the danger of unfair prejudice.

Clearly the third prong must be considered in light of the Supreme Courts decision in Huddleston v. United States, 485 U.S. 681, 108 S Ct. 1496, 99 L Ed 2d 771 (1988 in which the Court held that the test is whether " the Jury could reasonably find the conditional fact... by a preponderance of the evidence" id 690 108 S Ct. at 1501, 199 L Ed. 2d at 783.

It is respectfully contended here that the Government has not met the test required for the admission of the evidence, and that the prejudice clearly out weighs any probative value that the picture could have held for the Governments case. It is respectfully

contended that the sole reason for the introduction of the evidence was to present to the Jury indirectly bad character or propensity of bad character on the part of the Petitioner which improper, and thus violated the requirements set forth in Rule 404(b) for admission. It is further contended that the err was clearly prejudicial to the Petitioner, and he should therefore be afforded a new trial.

It is further respectfully candid that even with the limiting instruction as given by the Court is very analogous to the old adage that you can not remove "a drop of ink from a glass of water". Unfortunately, Jurors minds are not like black boards where we can simply erase prejudice on inflamed passion once it is set in motion. While the Court gave a

proper limiting instruction, the instruction was not sufficient since the evidence clearly failed the test of Rule 404(b) and should not have been admitted in the first place so as to require a limiting instruction.

II. THE COURT BELOW FAILED TO PROPERLY APPLY THE STANDARDS OF 18 U.S.C. § 3501 REGARDING ADMISSION OF CONFESSIONS IN FINDING THAT THE TRIAL DID NOT ERR IN ALLOWING INTO EVIDENCE, OVER THE OBJECTION OF THE PETITIONER, SEVERAL PURPORTED STATEMENTS OF THE PETITIONER.

The Government sought to introduce and, over the objection of the Petitioner, was allowed to introduce, three [3] separate purported statements of the Petitioner over the objection of Petitioner's counsel.

The Government introduced through

the testimony of Special Agent, David Banes, a purported statement of the Petitioner given on April 24, 1990, at approximately 7:15 p.m. Agent Banes testified that when he spoke with the Petitioner at the time of the search he knew that Waycaster was a suspect, but he did not advise him of any constitutional rights, nor did he read to the Petitioner, his "Miranda Warnings." He further testified that he did not advise Waycaster that he had a right to have an attorney present, knowing full well that, during the questioning, the questions being asked were to facilitate his investigations of items seized pursuant to the Search Warrant and affidavit which he intended to use against the Petitioner at a later time. Agent Banes further testified that at the time he questioned

the Petitioner, he was a suspect, but that he was not under arrest or in custody and was free to go. During the course of the search which lasted most of the day, the Petitioner was restricted from going into any of the residences, but other than those secure areas, he could go as he pleased or, in the alternative, he did not have to be there. The officer did indicate that Petitioner's vehicle was seized at the end of the day and, after the search was concluded, the Petitioner was allowed to go back to his residence. Agent Banes testified that the Petitioner told him the substance identified as Government's Exhibit Thirty-Nine (39) was "crank" and that he had purchased it to help his wife lose weight and that he had purchased it from a truck stop in McDowell County the

previous weekend. It is clear from the testimony of the chemist and all the surrounding facts that the substance seized in the form as analyzed certainly was not "crank," so clearly the Petitioner did not know, even assuming that the statement was given to Barnes, which is denied that the substance was P-2-P, a controlled substance, nor would he have known under normal circumstances without testing or smelling the substance or being a chemist in performing the various tests as outlined by Agent Allcox, that the controlled substance complained of existed in Government's Exhibit Thirty-Nine (39).

With regard to the statement purportedly made by the Petitioner to Special Agent Kenneth A. Razza.

The statement allegedly made to

Special Agent Razza was incriminating; however, on cross-examination, Agent Razza said that the statement was prepared from notes that he took on the occasion, and that he did not record this interview. He acknowledged that he could not say that the statement was word-for-word or said by the Petitioner, but rather was a synopsis.

The Petitioner also allegedly made a statement to Special Agent Ayala which was exculpatory and is therefore not objected to. Waycaster denied any involvement and any legal activity and clearly showed a cooperative attitude with said officer which is indicative of innocence rather than guilt, it is contended.

The other statements purportedly made by the Petitioner, actually two [2] statements, were read into evidence by Special Agent Clark and again are exculpatory, rather than inculpatory.

The admissibility of confessions is governed by 18 U.S.C. § 3501, which requires the Court to conduct a hearing outside of the presence of the jury to determine the voluntariness of the statement. Pursuant to 3501(b), the Trial Court, in determining the issue of voluntariness, is required to take into consideration all of the circumstances surrounding the giving of the confession, including (1) the time elapsing between the arrest and arraignment of the Petitioner making the confession, if it was made after arrest and before arraignment; (2) whether such Petitioner

knew the nature of the offense with which he was charged or of which he was suspected at the time of the making of confession; (3) whether or not such Petitioner was advised or knew that he was not required to make any statement, and that such statement could be used against him; (4) whether or not such Petitioner had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such Petitioner was without the assistance of counsel when questioned and when giving such confessions.

In determining whether the confession was freely and voluntarily made within the meaning of 18 U.S.C. § 3501, the Government is not required to prove voluntariness beyond reasonable doubt, but need only demonstrate that

fact by the preponderance of the evidence. United States v. Johnson, (1974, CA4SC) 495 F2nd 378, cert. denied 419 U.S. 860, 42 L Ed 2nd 95, 95 S. Ct. 111. It should be remembered, however, that 18 U.S.C. § 3501 does not alter the general rule that the Government has the burden of proving, beyond a reasonable doubt, that a confession was not obtained by violation of Petitioner's constitutional statutory rights. United States v. Schipani (1968 DCNY) 289 F supp 43, Affd (CA2NY) 4414 F2nd 1262, cert. denied 397 US 922, 25 L Ed 2nd 102, 90 Sct 902

The Government has the burden of proving, by preponderance of the evidence, the Petitioner's statements made to federal officers were voluntary; that burden is heavy especially where a Petitioner waives a right to presence of

attorney at his interrogation. United States v. Hollis 1975, DCDEL) 387 F Supp 213.

It is respectfully contended that with regard to the purported statement to Agent Razza, not only does the question of voluntariness enter, but also the question of whether or not the statement purportedly made by the Petitioner is, in fact, the statement that he made. Since the statement is inculpatory to a degree, it is extremely important that it be accurate if it is to be read to a jury for a jury to form conclusions on what was said or not said by the Petitioner who, in this case, did not take the stand. Clearly, when the officer admits that it is not word-for-word and is simply a narration, a jury could not properly determine exactly what was said

and; therefore, the denial of the Petitioner's Motion to Suppress warrants error. With regard to the purported statement made to Barnes, it is respectfully contended that the Government has failed in its burden to demonstrate that the Constitutional Rights of the Petitioner were not violated and has further failed to establish that the statement was voluntary. For these reasons, the statements complained of should have excluded, and a failure to do so constituted prejudicial error requiring a new trial for the Petitioner.

III. THE COURT BELOW ERRED IN FAILING TO GRANT THE PETITIONER'S RULE 29 MOTION FOR JUDGEMENT OF ACQUITTAL DUE TO THE INSUFFICIENCY OF THE EVIDENCE AT THE

CLOSE OF THE GOVERNMENT'S CASE AND AT THE CLOSE OF ALL THE EVIDENCE.

In ruling on a motion for a Judgement of Acquittal, the Court must assess a sufficiency of the evidence. United States v. Ammons, 682 F supp 1332 (W.D.N.C. 1988) In making such an assessment, the issue is not whether the Court is convinced of guilt beyond a reasonable doubt, but rather, when the evidence is viewed in the light most favorable to the Government, whether any reasonable trier of facts could have found the Petitioner guilty beyond a reasonable doubt. United States v. Excell, 91-5036 1992 U.S. App. LEXIS 465 at 4 (Fourth Cir., January 16, 1992, cert. denied __ US__ 112 s. ct. 1988 (1992) (Citing United States v. Tresvant, 677 F.2nd 1018, 1021) Fourth Cir. 1982;

see also United States v. Pequero, 91-5644 (1992 U.S. App. Lexis 403) Fourth Cir. January 14, 1992) It is respectfully contended that the evidence at the close of the Government's case as to all counts was insufficient to meet the test required by Rule 29.

Count Three of the indictment charged the Petitioner with "knowingly and intentionally" possessing Phenyl-2-Propanone on April 24, 1990, in violation of 21 U.S.C. § 844. To sustain a conviction, the Government had to prove three [3] essential elements beyond a reasonable doubt: (1) That the Petitioner possessed Phenyl-2-Propanone; (2) That he did not obtain this substance directly pursuant to a write of prescription; or order from a practitioner while acting in the course

of his professional practice; and (3) That Petitioner didn't so knowingly and intentionally 21 U.S.C. § 844.

At the trial, Special Agent Irvin Lee Allcox of the North Carolina State Bureau of Investigation, after being stipulated to being an expert in the field of forensic chemistry, testified that Phenyl-2-Propanone, commonly called P-2-P, is a chemical that is used in the manufacture of Methamphetamine and Amphetamine and is a Schedule II controlled substance. Agent Allcox further testified that he participated in a search of the Petitioner's residence on April 24, 1990, and in that capacity, obtained Government's Exhibit Thirty-Nine (39) from a dresser in one of bedrooms of the residence and found it to contain a tan powder weighing approximately 12.1

grams. Agent Allcox further testified that, after performing an analysis of Government's Exhibit Thirty-Nine (39), he found the same to contain a trace amount of Phenyl-2-Propanone, a Schedule II controlled substance. From analysis, he determined that the 12.1 grams of material also contained the non-controlled substances Ephedrine and caffeine. On cross-examination, Agent Allcox acknowledged that he did not perform a quantitative analysis and acknowledged that his analysis showed only a trace amount of P-2-P which would amount to less than One Percent [1%] of the total. Agent Allcox further testified that unless you were a chemist, performed the tests that he performed and/or smelled the characteristic odor of P-2-P in the substance, one would not be

aware that P-2-P was present. He further acknowledged that an individual who took the substance wrapped in plastic or a small bag and did not test or smell it, would not know that P-2-P was there because it was only a trace amount. Agent Allcox further testified that "crank" is a slang name used on the street for Amphetamine or Methamphetamine. However, the substance marked as Government's Exhibit Thirty-Nine (39) was not Methamphetamine and would not be normally be referred to under the slang name "crank" based upon his experience.

Agent Allcox further testified that Petitioner's Exhibit Ten (10) is a perfectly legal substance which can be bought at truck stops, stores or various places, and contains Ephedrine

Hydrochloride. He further testified that, with the exception of the trace amount of P-2-P, the legal substance demonstrated by Petitioner's Exhibit Ten (10), is identical to the remaining substances found in Government's Exhibit #39. He further testified that the legal substance, less the P-2-P, could be purchased at a number of places, including drug stores and truck stops and is offered under a number of different labels, including "Heads-Up" and "Maximum Strength Ephedrine Plus" and are perfectly legal to purchase.

Agent Allcox further testified that, of his own knowledge, he did not know who Government's Exhibit Thirty-Nine (39) belonged to and that no fingerprint analysis was made to connect the substance with the Petitioner. Agent

Allcox on, questioning by Defense counsel, acknowledged when handed one of Petitioner's exhibits which was a legally obtainable bottle marked as Petitioner's Exhibit Ten (10), that from where he was sitting, he did not know whether that bottle in its sealed condition contained P-2-P or not until he, as a chemist, had tested it or done various analysis on it, including smell or whatever else was appropriate.

Special Agent David Barnes of the North Carolina State Bureau of Investigation also testified at trial that he was present at the search of the Petitioner's home and testified over the objection of the Petitioner to various statements allegedly made by the Petitioner prior to being taken into custody. The voluntariness of the

statements is discussed as an additional issue herein and that argument is adopted herein by reference. In addition to the problems concerning the voluntariness of the statement, this statement itself clearly is at odds with the evidence received from Agent Allcox by the Government in its examination. Agent Barnes testified that when he spoke with the Petitioner at the time of the search he knew that Waycaster was a suspect, but he did not advise him of any constitutional rights, nor did he read to the Petitioner, his "Miranda Warnings." He further testified that he did not advise Waycaster that he had a right to have an attorney present, knowing full well that, during the questioning, the questions being asked were to facilitate his investigations of items seized

pursuant to the Search Warrant and affidavit which he intended to use against the Petitioner at a later time. Agent Barnes further testified that at the time he questioned the Petitioner, he was a suspect, but that he was not under arrest or in custody and was free to go. During the course of the search which lasted most of the day, the Petitioner was restricted from going into any of the residences, but other than those secure areas, he could go as he pleased or, in the alternative, he did not have to be there. The officer did indicate that Petitioner's vehicle was seized at the end of the day and, after the search was concluded, the Petitioner was allowed to go back to his residence. Agent Barnes testified that the Petitioner told him the substance identified as Government's

Exhibit Thirty-Nine (39) was "crank" and that he had purchased it to help his wife lose weight and that he had purchased it from a truck stop in McDowell County the previous weekend. It is clear from the testimony of the chemist and all the surrounding facts that the substance seized in the form as analyzed certainly was not "crank," so clearly the Petitioner did not know, even assuming that the statement was given to Barnes, which is denied that the substance was P-2-P, a controlled substance, nor would he have known under normal circumstances without testing or smelling the substance or being a chemist in performing the various tests as outlined by Agent Allcox, that the controlled substance complained of existed in Government's Exhibit Thirty-Nine (39).

Clearly, the jury had confusion concerning this issue since they sent, after deliberations began, a note to the Court, asking "was the substance taken from the dresser an illegal substance and was the amount of P-2-P enough to be illegal possession?". The Court reinstructed the jury concerning the standards and, thereafter, the jury returned a verdict of guilty as to Count III of the indictment.

In the case of United States v. Bernard, 757 F2nd 1439 (Fourth Cir. 1985) the Court considered the issue of whether a quantity of controlled substance is an essential element to be proven in a charge for simple possession under 21 U.S.C. § 841 (a)(1)). The Court stated indica that the quantity of controlled substance is not a consideration in cases

involving simple possession under 21 U.S.C. § 844(a).

It is required that the Government must prove beyond a reasonable doubt that the Petitioner possessed a measurable amount of a controlled substance. United States v. Blackston, 940 F2nd 877, 883 (Third Cir. 1981, cert. denied U.S., 112 s. ct. 611 (1991) (cited Bernard)

The Trial Court took the position as set forth in United States v. Jeffers, 524 F2nd 253 (Seventh Cir. 1975) concerning the "measurable amount" standard and so instructed the jury, both originally and at the time the question was asked by the jury. It is respectfully contended that the Government failed to meet the tests required to establish each and every element of the offense charged in Count III of the

indictment and, therefore, a Motion for Acquittal should have been allowed. It is contended by the Petitioner that the failure to grant the motion constituted error which is prejudicial to the Petitioner, and the Court should, therefore, overrule the Court's determination and grant the motion dismissing Count III as well as the other Counts for failure to comply with requirements for proving each of the elements even in the light most favorable to the Government.

CONCLUSION

The Petitioner, for the reasons as set forth hereinabove, respectfully prays this Court to grant this petition for a writ of certiorari for determination by this Court of the issues as set forth herein. The Petitioner respectfully

argues that unless the petition is granted, the Petitioner has no other course of redress for the protection of his constitutional rights. For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 25 of the Rules of the U.S. Court of Appeals Fourth Circuit, I hereby certify that I have this 4th day of November 1994, filed the required copies of the Petition for Writ of Certiorari in the Clerk's Office, and have mailed the required copies of the Petitioners' Writ to:

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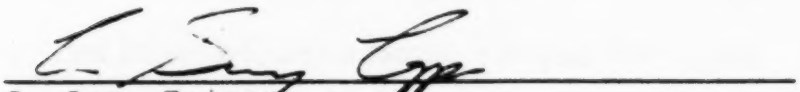

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No._____

UNITED STATES SUPREME COURT

November Term, 1994

UNITED STATES OF AMERICA, Plaintiff/ Respondent,	)
v.	)
NICK BERLEY WAYCASTER, Defendant/ Petitioner.	)

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI

Appeal from the United States District Court
for the Western District of North Carolina, at Asheville,. Richard L. Voorhees, Chief District Judge. (CR-91-136).

Argued: July 20, 1994
Decided: September 6, 1994

Before LUTTIG and WILLIAMS, Circuit Judges, and ANDERSON, United States District Judge for the District of South Carolina, sitting by designation.

COUNSEL

ARGUED: C. Gary Triggs, C. GARY TRIGGS, P.A., Morganton, North Carolina, for Appellant. Jerry Wayne Miller, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Asheville, North Carolina, for Appellee. ON BRIEF: Mark T. Calloway, United States Attorney, Thomas R. Asick, Assistant United States Attorney, Asheville, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Nick Berley Waycaster was found guilty of conspiracy to manufacture and to distribute amphetamines, in violation of 21 U.S.C.A. § 846 AND 841(a)(1) (West 1981 & Supp. 1994), and possession of phenyl-2-propanone, in violation of 21 U.S.C.A. § 844 (West Supp. 1994).[1] Waycaster argues that the direct court committed several reversible trial errors, including (1) admitting into evidence a photograph of Waycaster and some coconspirators, (2) allowing detectives to testify regarding statements allegedly made by Waycaster, and (3) denying his Motion for Judgment

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[1]Waycaster was charged in an eight-count indictment, but the other five counts, which involved money laundering, were dismissed at trial.

of Acquittal based upon insufficient evidence. Finding no error, we affirm Waycaster's conviction.[2]

I.

The evidence in the record demonstrates that Waycaster, along with Larry Vaughn and Colin Kelly, entered into a conspiracy to manufacture and distribute amphetamines from 1987 to 1990. Waycaster purchased the ingredients necessary to make amphetamines through his chemical company, NIC Chemical, and distributed the product; Vaughn, a chemist, produced the amphetamines. Kelly joined the conspiracy during its second year and

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[2]Waycaster was sentenced to 188 months imprisonment on Counts One and Two, and twelve months on Count Three. He does not challenge the district court's sentencing application.

assisted in gathering ingredients and making sales.

On February 21, 1990, agents with the North Carolina State Bureau of Investigation (SBI) located an underground laboratory during a search of Vaughn's rural residence in McDowell County, North Carolina.[3] They also discovered numerous laboratory instruments and chemicals, including a funnel, a suction flask, filter paper, sulfuric acid, ether, and glacial acetic acid. During the search, Waycaster arrived at the residence. As a result, on April 24, 1990, agents searched Waycaster's residence and uncovered a plastic bag containing phenyl-2-

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[3]The property was owned by Vaughn under the alias "Richard Lawrence".

propanone, a Schedule II controlled substance.[4]

Waycaster's trial began on November 2, 1992. Vaughn and Kelly both cooperated with the Government and testified at trial regarding the makeup of the conspiracy and incriminating statements made by Waycaster concerning his role in the conspiracy. On November 5, 1992, the jury returned a guilty verdict against Waycaster on all three counts. The district court denied Waycaster's Motion for Judgment of Acquittal brought pursuant to Fed. R.

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[4]Phenyl-2-propanone is an "immediate precursor" to the Schedule II substances amphetamine and Methamphetamine. 21 C.F.R. § 1308,12(g)(1) (1994). Under 21 U.S.C. § 811(e) (1988), an "immediate precursor" may be placed in the same schedule as the controlled substance of which it is an immediate precursor.

Crim. P. 29.[5] After sentencing, Waycaster timely appealed.

II.

Waycaster first contends that the direct court erred in allowing into evidence a photograph taken during the time of the conspiracy showing Waycaster, Vaughn, and other coconspirators sitting together at a table in Vaughn's residence, which was the site of the underground laboratory. On the table was a batch of stimulants made from legal substances which are known as L-ephedrine hydrochloride. He asserts that, although the substance shown was not illegal and no illegal activity was depicted in the photograph, the photograph conveyed a

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[5]Waycaster unsuccessfully moved for Judgment of Acquittal at the close of the Government's evidence, prior to submission of the case to the jury, and after the jury verdict.

highly prejudicial connotation of a conspiracy between Waycaster and the others in the picture, and it should have been excluded. We find no error in the admission of the picture.

"It is well-settled that decisions regarding the admission and exclusion of evidence are peculiarly within the province of the direct court, not to be reserved on appeal absent an abuse of discretion." *Martin v. Deiriggi*, 985 F.2d 129, 137 (4th Cir. 1992). Moreover, "any error in admission or exclusion [of evidence] is subject to the harmless error test: 'whether it is probable that the error could have affected the verdict reached by the particular jury in the particular circumstances of the trial.'" *United States v. Morrison*, 844 F.2d 1057, 1078 (4th Cir.) (quoting *United States v.*

Davis, 657 F2.d 637, 640 (4th Cir. 1981), cert. denied, 488 U.S. 908 (1988).

Fed. R. Evid. 404(b) provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident....

In ruling on the admissibility of the photograph, the district court stated as follows:

> [T]he essence of [the photograph] needn't be that it's bad or illegal but... whether or not it has... similarities that would show... plan or preparation or motive.
>
> ...[I]f it's a small manufacturing operation of anything it might tend to indicate... that was a signature here. That it was done in a similar way with the illegal substance. That's what... for which it would be admissible.

(J.A. at 35) The district court did not abuse its discretion in admitting the photograph as a demonstration of Waycaster's knowledge and preparation regarding the drug process, as well as the identities of, and Waycaster's relationship with, the coconspirators. Moreover, the photograph was admitted with a limiting instruction[6] which ade-

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[6]The limiting instruction stated, in part, as follows:

> You've heard evidence...that the Defendant did something in relation to this substance about which the witness has now testified which may be similar to the act or accts alleged or charged in this case. So if it happened at all, and that's for you to say, ... what the evidence shows as being for you to determine. You must not, in any event, consider this evidence in deciding whether the Plaintiff [sic] committed any acts which he is charged with in this case....
>
> However, you may consider the evidence for other limited purposes. If you find beyond a reasonable doubt from the other evidence in this case that the (cont'd)

quately explained it narrow purpose in accordance with Rule 404(b), and we generally follow the presumption that the jury obeyed the limiting instructions of the district court. *See, e.g.*, *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) ("[J]uries are presumed to follow their instruction."); *United States v. Ince*, 21 F.3d 576, 584 (4th Cir. 1994)

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[6] Plaintiff [sic] did the things that the Government contends that he did relative to the charges here then you may consider this other evidence of similar acts or acts relative to making some other substance.

In determining whether the Defendant in this case had the state of mind or the intent necessary to perform the acts charged in this case, or whether he had the motive, or the opportunity... [o]r whether the Defendant had a plan or acted in preparation for those things with which he is charged in this case.

(J.A. at 151-52.)

("[W]e recognize the presumption of cure by a court's instruction.").

III.

Waycaster next contends that the district court erred in admitting into evidence several statements that Waycaster made to special agents with the SBI. Agent David Barnes testified that during the search of Waycaster's residence on April 24, 1990, Waycaster told him that the bag on his dresser contained crank that "[h]e had purchased ...to help his wife lose weight...[a]nd he had purchased it the previous weekend at a truck stop...." (J.A. at 364-65.) Agent Ken Razza testified that, during an interview at Waycaster's office on April 26, 1990, Waycaster told him that "he had the ability to uncover [the] amphetamine distribution network in the United

States," and that "he had sold chemicals that he knew to be used in the synthesis of amphetamines." (J.A. at 387.) Waycaster argues that these statements were analogous to a confession,[7] and that the Government failed to meet its burden of establishing that the statements were made voluntarily. We find that the district court did not err in admitting these statements.

The district court, out of the presence of the jury, held a hearing on the voluntariness issue and ruled that both statements were voluntary.[8] With

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[7]"[T]he term 'confession' means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing." 18 U.S.C. § 3501(e) (1988).

[8]18 U.S.C. §3501(a) provides as follows:

> [A] confession... shall be admissible in evidence if it is voluntarily given. (cont'd)

regard to the statement Waycaster made to Agent Barnes, the court stated that "it was a voluntary statement and not custodial in the sense of depriving the Defendant of his free will." (J.A. at 363.) The district court used the same analysis with regard to Waycaster's conversation with Agent Razza, and found that statement also to be voluntary. (J.A. at 391.) The district court properly determined that Waycaster was not under arrest or in custody when the

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[8] Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determined that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

statements were voluntarily made, *see* 18 U.S.C. §3501(d) (Section 3501 does not "bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention"), and Waycaster has pointed to no other basis for challenging the admission of his statements.

IV.

Finally, Waycaster contends that the district court erred in denying his Motions for Judgement of Acquittal. We must decide whether, when viewing the evidence in the light most favorable to the Government, there is substantial evidence in the record to support the jury's finding that the essential

elements of the crimes charged were satisfied beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Giunta*, 925 F.2d 758, 764 (4th Cir. 1991).

Counts One and Two of the indictment alleged a conspiracy to manufacture and to distribute amphetamines, in violation of 21 U.S.C.A. § 846 and § 841. Two coconspirators and several agents testified regarding Waycaster's role in the conspiracy. Their testimony was corroborated by Waycaster's own incriminating statements, including his disclosure to Agent Razza that he had sold chemicals that he knew were going to be used to make amphetamines. We find that this evidence was sufficient to convict Waycaster of Counts One and Two.

Count Three of the indictment

pertained to Waycaster's possession of phenyl-2-propanone, in violation of 21 U.S.C.A. § 844.[9]

Waycaster claims that the quantity of phenyl-2-propanone was too small to sustain his conviction We disagree. Agent Irvin Allcox, an expert in forensic chemistry, testified that he was present at the search of Waycaster's residence, and that a plastic bag recovered from a dresser in the residence contained a "trace amount" of phenyl-2-propanone. Moreover, Agent Barnes testified that, during the search of Waycaster's residence. Waycaster told him he had purchased the substance the previous week

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[9]21 U.S.C. §844(a) provides that it is "unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice."

at a truck stop to help his wife lose weight. Accordingly, since Waycaster was found to be in possession of a "measurable amount" of phenyl-2-propanone, the actual quantity is irrelevant. *See, e.g.*, *United States v. Blackston*, 940 F.2d 877, 883 (3d Cir.) ("When the charge is simple possession, the quantity of the drugs is generally irrelevant (as long as the defendant is found to have possessed a 'measurable amount')...."), *cert. denied*, 112 S. Ct. 611 (1991); *United States v. Bernard*, 757 F.2d 1439, 1443 (4th Cir. 1985) ("Quantity... is not a consideration in cases of simple possession under 21 U.S.C. § 844(a)."). We find that there was sufficient evidence to sustain Waycaster's conviction on Count Three.

V.

For the foregoing reasons, we affirm Waycaster's conviction.

AFFIRMED